



GRANTED

The moving party is hereby **ORDERED** to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.

Katherine R. Delgado
District Court Judge

DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, ADAMS COUNTY, COLORADO

Adams County Justice Center
1100 Judicial Center Drive
Brighton, CO 80601

STATE OF COLORADO, ex rel. JOHN W. SUTHERS,
ATTORNEY GENERAL,

Plaintiff,

v.

THERMAL ADVANTAGE, INC., f/k/a T.A. EMPIRE,
INC., a Colorado corporation,

and

EUGENE APPLEHANS, individually,

Defendants.

▲ COURT USE ONLY ▲

Attorneys for Plaintiff:

JOHN W. SUTHERS, Attorney General
ANDREW P. McCALLIN, First Assistant Attorney
General, Reg. No. 20909*
ERIK R. NEUSCH, Assistant Attorney General,
Reg. No. 33146*
1525 Sherman Street
Denver, Colorado 80203
Phone: 303-866-5079
*Counsel of Record for Plaintiff

Case No.: 07CV1902

Div. C

Attorneys for Defendants:

Mark Bender, Reg. No. 12164
General Counsel
8671 Wolff Court, Suite 100
Westminster, Colorado 80031
Phone: 720-763-3466

MODIFIED STIPULATED FINAL JUDGMENT

Plaintiff, the STATE OF COLORADO, upon relation of Attorney General John W. Suthers, by and through the undersigned counsel, and Defendants THERMAL ADVANTAGE, INC. and EUGENE APPLEHANS, jointly consent to the entry of this Modified Stipulated Final Judgment and its provisions without trial or other adjudication of issues of fact or law. Plaintiff and Defendants consent to the entry of this Modified

Stipulated Final Judgment to avoid the additional time and expense associated with continuing litigation. This Modified Stipulated Final Judgment shall bind Plaintiff and Defendants, and any successors or assigns, and shall be binding on any and all future purchasers, merged parties, inheritors or other successors in interest of the individual and corporate defendants who are parties to this judgment.

NOW, THEREFORE, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter and the parties for the purpose of entering this Modified Stipulated Final Judgment and enforcing the Stipulated Final Judgment entered by this Court on May 21, 2008. Jurisdiction is retained by this Court to enable the parties to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for the construction, modification, or execution of this order and the enforcement of this order and punishment of violations thereof.

2. This Court is authorized to issue a permanent injunction and other relief pursuant to C.R.S. §§ 6-1-110(1), 6-1-112(1) and 6-1-113(4) of the Colorado Consumer Protection Act (“CCPA”).

II. VENUE

3. Pursuant to C.R.S. § 6-1-103, venue as to all matters between the parties relating to or arising out of this judgment lies in the District Court, Adams County, Colorado.

III. DEFINITIONS

4. The following definitions shall apply to the terms of this document:

4.1 “Stipulated Final Judgment” shall refer to the document entitled “Stipulated Final Judgment” in the matter of *State of Colorado v. Thermal Advantage, Inc., et al.*, Civil Action No. 07cv1902, District Court, Courtroom C, Adams County, Colorado, entered and approved by the Court on May 21, 2008.

4.2 “Modified Stipulated Final Judgment,” “Final Judgment,” “judgment” or “Order” shall refer to this document.

4.3 “Clearly and Conspicuously” is defined as follows: A statement is “clear and conspicuous” if it is disclosed in such size, color, contrast, location, duration, and audibility that it is readily noticeable, readable and understandable. A statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, in a manner readily noticeable, readable, and understandable, and it must not be obscured in any manner.

Audio disclosure shall be delivered in a volume and cadence sufficient for a consumer to hear and comprehend it. Visual disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for a consumer to read and comprehend it. In a print advertisement or promotional material, including without limitation point of sale display or brochure materials directed to consumers, the disclosures shall be in a type size and location sufficiently noticeable for a consumer to read and comprehend it, in a print that contrasts with the background against which it appears.

4.4 “Consumer,” “consumers” or “homeowners” shall refer to and include any persons who have done business with Defendants since August 22, 2006 to the present or who may do business with Defendants in the future.

4.5 “Colorado Consumer Protection Act” shall refer to the Colorado Consumer Protection Act, §§ 6-1-101, *et seq.*, C.R.S. (2007).

4.6 “Defendants” shall refer to Thermal Advantage, Inc. and Eugene Applehans.

4.7 “Monetary Relief” shall refer to the monies paid to the Attorney General pursuant to the terms contained in Part VI herein, and other monies payable to the Attorney General as the result of proceedings to enforce this judgment or which otherwise shall be collected by the Attorney General pursuant to the terms herein.

4.8 “Persons bound” shall refer to Defendants, as well as, all persons, businesses, corporations, associations, or other entities, acting by, through, or on behalf of Defendants as well as those persons, businesses, corporations, associations or other entities in active concert or participation with the Defendants, and who have actual or constructive knowledge of this Modified Stipulated Final Judgment. “Persons bound” includes Thermal Advantage, Inc., The Thermal Advantage, Inc., Thermal Advantage Difference, Inc., Energy Conservation Group, LLC, Energy Research Group, Inc., and any and all successors and assigns.

4.9. “Plaintiff” shall refer to the State of Colorado, upon relation of Attorney General John W. Suthers.

IV. PERMANENT INJUNCTION

5. Defendants and all persons bound by this Order are permanently enjoined and restrained from directly or indirectly engaging in any of the following conduct in the state of Colorado and are permanently bound to ensure the full disclosure of all material facts in the advertising and sale of the products and services of Thermal Advantage, Inc., including, but not limited to, the specific activities:

Prohibited Misrepresentations

5.1. Any representations regarding the characteristics, quality, cost or availability of the products or services of Thermal Advantage, Inc. to Colorado consumers in any written advertising medium, including, but not limited to, any newspaper, periodical, magazine, Internet website, promotional literature, or other type of written advertisement, or in any radio or television ad, or in verbal representations to consumers, either in person or via telephone, unless such representation is true and not misleading. By way of example, and not limitation, the following misrepresentations are prohibited:

5.2. Representing, implying, claiming or stating that any "test program" is being conducted by Thermal Advantage, Inc. either in conjunction with a manufacturer or another third party;

5.3. Representing, implying, claiming or stating that only a limited number of consumers will receive price discounts, additional compensation, or additional services such as thermal energy testing;

5.4. Representing, implying, claiming or stating that any Thermal Advantage, Inc. product or service is "free," requires no "out-of pocket money" or "no additional payments" unless such a statement is true and not misleading;

5.5. Representing, implying, claiming or stating that the thermal testing of windows purchased from Thermal Advantage, Inc. is free, as in the advertised statement, "All labor is paid for through the Energy Conservation Program," unless such statement is true and not misleading;

5.6. Representing, implying, claiming or stating that only a limited number of consumers will be able to participate in a "test program," an energy assessment procedure or the advertised energy savings guarantee;

5.7. Representing, implying, claiming or stating any other deceptive or misleading statements regarding the characteristics, quantity, quality or price of Thermal Advantage, Inc. products or services;

5.8. Representing, implying, claiming or stating any other deceptive or misleading claim to the public regarding the products or services sold or provided by Thermal Advantage, Inc.

5.9. Defendants and other persons bound by this Order shall not train, instruct, advise, direct nor provide to their employees and/or agents who communicate with consumers, any scripts, manuals and/or training materials that contain language or instructions likely to promote confusion or misunderstanding for the consumer.

Mandatory Disclosures

6. Defendants and all persons bound by this Order are required to fully disclose all material facts related to the sale of Thermal Advantage, Inc. products or services, in all advertisements in any media and in all verbal presentations to consumers in person, by telephone, or electronically, including, but not limited to the following examples:

6.1. That a consumer will be compensated for “participating” in any sales campaign or “test” or “energy study” unless the exact nature of that compensation is fully disclosed in all advertisements and in all verbal communications with the public or an individual consumer;

6.2. The statement “some fees apply” must be clearly and conspicuously displayed in any and all media advertisements in a font size 50% or greater than that of the rest of the advertisement;

6.3. That details of an advertised “40% energy savings guarantee and refund” are clearly and conspicuously displayed and set forth with particularity the conditions and purchase requirements restricting its applicability (for example, that the guarantee and refund are available only with a purchase of Thermal Advantage, Inc. products for the entire home);

6.4. That any refund to a consumer under the guarantee will be based only on the before and after installation thermal usage as measured in BTUs; and

6.5. Disclose fully any other material facts regarding the products, services and contract provisions of Thermal Advantage, Inc. verbally presented to consumers at the point-of-sale.

Reporting and Record Keeping Requirements

7. Defendants shall provide copies of all marketing material including advertisements in any format, employee sales scripts and any other solicitation tools to the Attorney General for compliance review for a period of two years from the date of this agreement within ten (10) days of a written request by Plaintiff for these materials.

8. Defendants shall maintain complete records of all sales contracts, before and after energy or thermal test results, consumer refunds and consumer requests for refunds and consumer complaints for a period of two years from the date of this agreement and to provide such records to the Attorney General for compliance review within ten (10) days of a written request for same.

9. If they have not already done so, Defendants shall contact all customers who entered into Thermal Advantage's "Energy Conservation Program," "test program" or who were promised the "Guarantee 40% Energy Savings" within thirty days of the one-year

anniversary of their product installation. Defendants will then review the heating bills of these customers for 12 months prior to and 12 months after installation of the windows. If a 40 percent savings difference in energy usage is not verified by these records, Thermal Advantage, Inc., will refund those customers the dollar amount necessary to equal a 40 percent savings as represented in the company's advertisements, written guarantee, contract materials and/or sales presentations.

10. Defendants shall maintain all documentation of compliance with Paragraph 9 beginning July 1, 2008. Such verification shall include the name and address of the customer, a copy of the customer's original purchase contract, verification of a 40% savings in heating costs or proof of the refund provided by Thermal Advantage, Inc. Defendants shall provide this information to the Attorney General within ten (10) days of a written request by Plaintiff for these materials.

11. Defendants represent and warrant to Plaintiff that Thermal Advantage, Inc., and its owners, managers, employees, contractors, agents, successors, and assigns will comply with the Colorado Consumer Protection Act, C.R.S. §§ 6-1-101 *et seq.*, as now constituted or as may hereafter be amended, in conducting business in the state of Colorado.

V. ADMISSION OF VIOLATION OF ASSURANCE OF DISCONTINUATION

12. Defendants hereby acknowledge and admit that the terms of the Assurance of Discontinuation, jointly agreed to on July 31, 2006, have been violated by Thermal Advantage, Inc.

VI. MONETARY RELIEF

13. Defendants shall pay to the Colorado Attorney General's Office ninety-five thousand dollars (\$95,000) in civil penalties under C.R.S. § 6-1-112 on or before December 31, 2010.

14. Payment of this amount shall be by official check or certified funds made payable to the Colorado Department of Law with a reference to "Thermal Advantage" and delivered to the Colorado Attorney General, Consumer Protection Section, 1525 Sherman Street, 7th Floor, Denver, Colorado, 80203, on or before December 31, 2010.

VII. CONSIDERATION

15. Defendants are entering into this Stipulated Final Judgment for the purpose of compromising and resolving disputed claims and to avoid the expense of litigation. Defendants' execution of this Modified Stipulated Final Judgment shall not be considered an admission by the Defendants except as set forth in Paragraph 12 above.

16. This Modified Stipulated Final Judgment is intended to finally and fully resolve all of the disputes between the Attorney General and Defendants arising out of the

conduct alleged in the Complaint; however, the Court retains jurisdiction to enforce compliance with the terms of the Modified Stipulated Final Judgment against Defendants and all persons bound.

VIII. RETENTION OF JURISDICTION

17. The Attorney General retains all rights and remedies under the Colorado Consumer Protection Act to enforce violations of this Modified Stipulated Final Judgment. Defendants understand that, in addition to any other remedies or penalties that may be imposed under this agreement, violation of any of the terms of this Modified Stipulated Final Judgment may result in contempt of Court proceedings, further injunctions restitution, disgorgement, civil penalties of up to \$10,000 for each violation, and such other further relief as the Court may deem appropriate pursuant to C.R.S. §§ 6-1-110(1), 6-1-112(2), and 6-1-113(4).

18. This Court shall retain jurisdiction over this matter for the purpose of enabling any party to this Modified Stipulated Final Judgment to apply to the Court at any time for any further orders which may be necessary or appropriate for the construction, modification or execution of this Modified Stipulated Final Judgment, and for the enforcement of compliance herewith and the punishment of violations hereof.

IX. ACKNOWLEDGMENTS

19. This Modified Stipulated Final Judgment shall not be construed to affect the rights of any private party to pursue remedies pursuant to § 6-1-113 of the Colorado Consumer Protection Act or under any other statutes or through actions in common law.

20. Pursuant to C.R.S. § 6-1-110(2), this Modified Stipulated Final Judgment shall be a matter of public record.

21. The parties understand and agree that a violation of any term of this Modified Stipulated Final Judgment shall give rise to the contempt remedies and penalties provided under § 6-1-112(2).

22. The parties agree that the Attorney General will provide Defendants and any other persons bound with written notice of an alleged violation of any term of this agreement and/or the Colorado Consumer Protection Act ten (10) days prior to initiating any action or proceeding against Defendants. Defendants will be allowed a period of ten (10) days to provide a written response to the Attorney General regarding the notice of the alleged violation.

23. Nothing herein constitutes approval by Plaintiff of Defendants' past business practices. Defendants shall not make any representation contrary to this paragraph.

24. Nothing herein shall be interpreted to prevent Plaintiff from taking enforcement action to address conduct occurring after the entry of this Modified

Stipulated Final Judgment that Plaintiff believes to be in violation of the law. The fact that such conduct was not expressly prohibited by the terms of this judgment shall not be a defense to any such enforcement action.

25. Defendants acknowledge that they have thoroughly reviewed this Modified Stipulated Final Judgment with their attorney, that they understand and agree to its terms, and that they agree that it shall be entered as the order of this Court.

Dated this 30th day of December, 2010.

/s/ Eugene Applehans

EUGENE APPLEHANS, individually

Dated this 30th day of December, 2010.

/s/ Larry Applehans

President

Authorized representative of Thermal Advantage, Inc.

Title

AGREED AS TO FORM ON BEHALF OF DEFENDANT THERMAL ADVANTAGE, INC., f/k/a T.A. EMPIRE, INC.

Dated this 30th day of December, 2010.

/s/ Mark Bender

MARK BENDER, General Counsel
8671 Wolff Court, Suite 100
Westminster, Colorado 80031
Phone: 720-763-3466

Dated this 30th day of December, 2010.

JOHN W. SUTHERS
Attorney General

/s/ Erik R. Neusch

ANDREW P. McCALLIN
First Assistant Attorney General
ERIK R. NEUSCH
Assistant Attorney General
Consumer Protection Section
Colorado Attorney General
1525 Sherman Street
Denver, Colorado 80203

Pursuant to C.R.C.P. 121, § 1-26(7), the original of this document with original signatures is maintained at the offices of the Colorado Attorney General, 1525 Sherman Street, Denver, Colorado 80203, and will be made available for inspection upon request.

This document constitutes a ruling of the court and should be treated as such.

Judge: Katherine R Delgado

Current Date: Dec 31, 2010

Case Number: 2007CV1902

Case Name: STATE OF COLO ATTY GENERALS OFFICE et al vs. THERMAL ADVANTAGE INC et al

/s/ Judge Katherine R Delgado